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No. 91-1958

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In The

Supreme Court of the United States

October Term, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

Petitioners,

vs.

WILLIAM MCKINNEY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, WEST VIRGINIA, WISCONSIN, AND WYOMING, AND THEDISTRICT OF COLUMBIA, THE TERRITORY OF GUAM, AMERICAN SAMOA, THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF THE AMICI CURIAE 2
SUMMARY OF THE ARGUMENT 3
ARGUMENT 4
I. The Issue of Whether the Cruel and Unusual Punishment Clause Requires Prison Administrators to Accommodate the Smoke-free Air Preferences of Non-smoking Inmates raises an Extremely Important Question of Federal Constitutional Law that Has Not Been but Should be Decided by this Court 4
II. The Ruling Below is in Direct Conflict with Decisions of other Courts of Appeals as to both the Objective and Subjective Components of Cruel and Unusual Punishment Claims ... 5
III. The Ruling Below Violates the Express Holding of this Court's Recent Decision in *Wilson v. Seiter* because Plaintiff Plainly Failed to Establish "Deliberate Indifference," even under the Most Lenient Interpretation of that Requirement 10
IV. The Mere Possibility that Forced Exposure to Levels of Secondhand Smoke Will Lead to Cancer or other Disease at some Unspecified Time in the Future Does Not Satisfy the Objective Component of a Cruel and Unusual Punishment Claim 12
V. The Ninth Circuit's Holding that Nevada's Anti-Smoking Statute Creates a Liberty Interest Protected by the Due Process Clause is Dependent Upon The Doubtful Proposition that Substantive Due Process Rights Can be Derived from State Law 13
CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Bell v. Wolfish, 441 U.S. 520 (1979) 2

Caldwell v. Quinlan, 729 F. Supp. 4 (D.D.C.), *aff'd.*, 932 F.2d 200 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 295 (1991) 9

Clemmons v. Bohannon, 956 F.2d 1523 (10th Cir. 1992) (en banc) 6-8, 13

Gorman v. Moody, 710 F. Supp. 1256 (N.D. Ind. 1989) 9

Hudson v. McMillian, 112 S. Ct. 995 (1992) 12

McKinney v. Anderson, 924 F.2d 1500 (9th Cir.), *vacated and remanded sub nom., Helling v. McKinney*, 112 S. Ct. 291 (1991), *reinstated*, 959 F.2d 853 (9th Cir. 1992) ..... *passim*

Paul v. Davis, 424 U.S. 693 (1976) 14

Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985) 14

Rhodes v. Chapman, 452 U.S. 337 (1981) 9, 13

Steading v. Thompson, 941 F.2d 498 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992) 8, 13

Wilson v. Lynaugh, 878 F.2d 846 (5th Cir.), *cert. denied*, 493 U.S. 969 (1989) 9

Wilson v. Seiter, 111 S. Ct. 2321 (1991) 2, 3, 7, 10, 11

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The amici States enumerated above, by their respective Attorneys General, submit this brief in support of the petition for certiorari to the United States Court of

Appeals for the Ninth Circuit filed by the Attorney General of Nevada from the order entered in the proceeding below on March 27, 1992, reinstating its original decision of February 1, 1991. The Ninth Circuit's most recent decision reinstates a judgment which had been vacated by this Court and remanded for further review in light of *Wilson v. Seiter,* 111 S. Ct. 2321 (1991).

INTEREST OF AMICI CURIAE

This Court has recognized that "[p]rison administrators [] should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish,* 441 U.S. 520, 547 (1979). The amici States thus have a significant interest in seeing that their administrative discretion to manage and operate their prison and jail facilities in the most efficient and effective manner consistent with legitimate security concerns not be unduly hampered by court-imposed orders requiring them to either ban smoking completely in prison or segregate prisoners according to their smoking or non-smoking preferences. Serious security problems could arise under either scenario, as a complete ban would physically and psychologically disturb many smoking prisoners, making them more prone to violent behavior, while attempting to segregate inmates according to smoking status could require ignoring important security concerns in assigning detainees to cells.

Furthermore, the amici States have a very significant interest in holding down the immense costs of building

and operating prisons and jails within their States. The decision below, if allowed to stand, would likely lead to even greater drains on State treasuries as segregating prisoners according to their smoking preferences would require either new prison facilities or extensive renovations. A complete ban on smoking would require more medical personnel to treat addicted smokers suffering withdrawal symptoms and/or more prison guards and other staff to deal with the likely increase in prison unrest.

SUMMARY OF THE ARGUMENT

This Court should grant the writ of certiorari in this case because the decision below determined a significant issue of Federal Constitutional law that has not been decided by this Court, and will have a severe impact upon the States' financial status, prison administration and security, and the welfare of the prisoners themselves. Furthermore, the ruling below is in direct conflict, in its analysis of both the objective and subjective components of Eighth Amendment claims, with numerous decisions of other federal courts of appeals that have rejected identical or similar cruel and unusual punishment claims.

Moreover, the Ninth Circuit's decision, in remanding for further consideration of the subjective component and not concluding, on the record, that the element was not satisfied, violated this Court's recent ruling in *Wilson v. Seiter,* 111 S. Ct. 2321 (1991), and improperly heeded the mandate, because plaintiff plainly failed to establish "deliberate indifference" even under its most lenient interpretation.

Furthermore, because this Court has never held, absent any present injury to a particular inmate, that conditions that merely enhance the risk (especially where that risk is subject to serious debate) of a prisoner contracting a disease sometime in the future constitute cruel and unusual punishment, the Ninth Circuit also erred in holding that the objective component of an Eighth Amendment violation was met.

Finally, the Ninth Circuit's separate decision holding that the Nevada anti-smoking statute creates a liberty interest in smoke-free prison libraries protected by the Due Process Clause unjustifiably expands *substantive* due process protection to interests created solely by State law.

ARGUMENT

I. The Issue of Whether the Cruel and Unusual Punishment Clause Requires Prison Administrators to Accomodate the Smoke-free Air Preferences of Non-smoking Inmates raises an Extremely Important Question of Federal Constitutional Law that Has Not Been but Should be Decided by this Court.

The impact of the decision below on the fiscal solvency of the States and the security of their prison facilities is potentially very severe. Because the proportion of smokers in prisons nationwide is approximately ninety per cent, *see* N.Y. Times, July 9, 1990 at A10, col. 5, virtually all prisons in the Nation will, if the judgment below is permitted to stand, be faced with major institutional and/or economic crises if non-smoking prisoners can demand smoke-free, or less smoky, air.

For this reason alone, putting aside the important constitutional question, certiorari should be granted to review a decision having such potentially devastating consequences.

The constitutional question whether it is cruel and unusual punishment to subject prisoners to levels of cigarette smoke that cause them no immediate or short-term ill effects, on the ground that it might endanger their health at some unspecified point in the future, is an important one that has not been addressed by this Court. In light of the high rate of smoking among inmates, thousands of non-smoking inmates are potentially being subjected to significant levels of secondhand tobacco smoke and thus they, too, have an interest in having this question resolved by this Court. Indeed, *all* prisoners will be greatly affected by resolution of this important issue, as a ruling upholding the decision below could lead to smoking bans which would be stressful and disturbing to the majority smoking inmates, and which not inconceivably could raise their own cruel and unusual punishment questions.

In short, certiorari should be granted so that this Court can resolve a constitutional problem that is currently having, and will continue to have, a most severe impact upon State fiscal responsibility, prison security, and prisoner welfare.

II. The Ruling Below is in Direct Conflict with Decisions of other Courts of Appeals as to both the Objective and Subjective Components of Cruel and Unusual Punishment Claims.

On February 14, 1992, an *en banc* panel of the United States Court of Appeals for the Tenth Circuit issued a

decision, reversing an earlier 3-judge panel decision, that directly and irreconcilably conflicts with the Ninth Circuit's decision in *McKinney*. *See Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 1992) (en banc). In *Clemmons*, the Court reached two distinct rulings, one on the objective component and the other on the subjective component of Eighth Amendment violations, each conflicting with corresponding portions of *McKinney*.

First, and most significantly, *Clemmons* held that the objective element of an Eight Amendment violation is not satisfied by evidence that forced exposure to certain levels of secondhand tobacco smoke poses a significant risk of future cancer. Some *current* serious adverse medical consequences from the exposure are required.

> . . . The Eighth Amendment does not sweep so broadly as to include possible latent harms to health. . . .
>
> . . . .
>
> Neither the Supreme Court nor this court has ever held that a potential, distant harm to a prisoner's health is a serious medical need. . . . Clemmon's complaint regarding [environmental tobacco smoke] is simply of a lesser magnitude than those cases that have found an Eighth Amendment violation. . . .

956 F.2d at 1527. The Tenth Circuit's conclusion – that *latent* harms, including the increased risk of future cancer due to long-term exposure to passive smoke, do not satisfy the objective component of a Cruel and Unusual Punishment claim – directly contradicts the Ninth Circuit's ruling that such risks (to the extent those risks are "unreasonable") do satisfy the objective component. On

this front, and as is relevant here, *Clemmons* cannot be distinguished from the Ninth Circuit's ruling as to the "objective component" of an Eighth Amendment claim.

Second, the *Clemmons* court adopted an interpretation of the "deliberate indifference" standard, the required subjective component of a "conditions of confinement" Eighth Amendment claim, *see Wilson v. Seiter*, 111 S. Ct. 2321 (1991), that also conflicts with the latest *McKinney* order. The Tenth Circuit in *Clemmons* essentially applied a "deliberate indifference" standard that required the inmate to show that the prison officials deliberately or purposely exposed the inmate to dangerous levels of secondhand smoke.

> . . . If plaintiff had shown or even alleged that defendants forced him to live with others who smoked and that they did so *intentionally*, knowing the smoke would have serious medical consequences for him, a different result might obtain.
>
> . . . Clemmons was required to present facts that would allow a reasonable fact finder to conclude that the defendants knew of the dangers of ETS and deliberately exposed him to it.

956 F.2d at 1528. Given the wholesale absence of any allegation or evidence presented by McKinney that the Nevada prison officials deliberately and purposely exposed him to dangerous levels of passive smoke, the *Clemmons* court would have flatly rejected McKinney's claims. But the Ninth Circuit in *McKinney*, on remand from this Court, refused to conclude that the subjective component of a Cruel and Unusual Punishment claim was not satisfied, and instead remanded to the district

court for consideration of "whether the prison officials showed deliberate indifference to McKinney's long term exposure to ETS."

The Ninth Circuit's broad remand order indeed does conflict with *Clemmons*, suggesting that, contrary to the test adopted by the Tenth Circuit, "deliberate indifference" can be established if the inmate merely proves that the defendants merely knew about the inmates exposure and the potential health hazards, but did nothing to stop it.

In sum, the Tenth Circuit in *Clemmons* poses two direct conflicts with the Ninth Circuit's *McKinney* decision in both critical components of Eighth Amendment jurisprudence.

The Ninth Circuit's ruling in *McKinney* also flatly contradicts a decision issued recently by the United States Court of Appeals for the Seventh Circuit in *Steading v. Thompson*, 941 F.2d 498 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992). Judge Easterbrook, writing for a unanimous court, rejected a prisoner's claim that his forced exposure to secondhand tobacco smoke in prison violates the Cruel and Unusual Punishment Clause because the plaintiff had failed to establish that the prison officials intended the passive smoke as punishment to him. Because McKinney brought forth no evidence to suggest that the Nevada prison officials intended his exposure to secondhand smoke, along with its potentially deleterious health effects, as punishment, the Seventh Circuit, in light of its ruling in *Steading*, would clearly have outright rejected McKinney's claim in the case at bar.

Other courts of appeals have also reached decisions that conflict, in varying degrees, with the ruling below. In *Wilson v. Lynaugh*, 878 F.2d 846 (5th Cir.), *cert. denied*, 493 U.S. 969 (1989), the Fifth Circuit Court of Appeals rejected a prisoner's claim that forced passive exposure to cigarette smoke in prison was cruel and unusual punishment. Although relying primarily on res judicata principles (plaintiff having already lost an earlier similar claim), the Court concluded that "evolving standards of decency that mark the progress of a maturing society," *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), had not yet reached the point of condemning forced exposure to secondhand smoke. 878 F.2d at 851. Moreover, the Ninth Circuit held that an Eighth Amendment violation could be established without even inquiring into evolving standards of decency. *McKinney*, 924 F.2d at 1507.

The United States Court of Appeals for the District of Columbia Circuit also affirmed, without opinion, the District Court decision in *Caldwell v. Quinlan*, 729 F. Supp. 4 (D.D.C.), *aff'd.*, 923 F.2d 200 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 295 (1991), rejecting an inmate's claim of cruel and unusual punishment based upon his forced exposure to secondhand smoke in prison. The District Court reasoned that "standards of decency" had not yet evolved to the point of forbidding forced prisoner exposure to passive smoke. 729 F. Supp. at 6-7.

There is also substantial federal district court precedent rejecting the position taken by the Ninth Circuit below. *See, e.g., Gorman v. Moody*, 710 F. Supp. 1256 (N.D. Ind. 1989) (rejecting prisoner's claim that his forced exposure to secondhand smoke is cruel and unusual punishment). While not in itself sufficient to counsel certiorari,

this precedent indicates that, at the very least, there is substantial dispute among the lower courts on the issue presented here. When combined with the inter-circuit conflicts that presently exist, this added conflicting precedent counsels review.

This Court, therefore, should grant the petition for certiorari for the additional purpose of resolving the conflicts among the different federal circuits, both as to whether forced inmate exposure to secondhand smoke satisfies the objective component of an Eighth Amendment violation, and as to the proper interpretation of the "deliberate indifference" standard as applied to exposure health risks.

III. The Ruling Below Violates the Express Holding of this Court's Recent Decision in *Wilson v. Seiter* because Plaintiff Plainly Failed to Establish "Deliberate Indifference," even under the Most Lenient Interpretation of that Requirement.

The Ninth Circuit, instead of holding outright that the deliberate indifference standard was not met, improperly remanded for consideration of that issue. This Court should reverse the Ninth Circuit's ruling because the Plaintiff's *proffer* clearly failed to establish the requisite "deliberate indifference," *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), even under the most lenient view of that standard which would only require a showing that the defendants knew about the inmate's exposure and its serious health hazards, but did not stop it.

Although there was evidence that the prison officials were made aware of McKinney's complaints about exposure to passive smoke and did not take any steps that succeeded in reducing McKinney's exposure, there was no evidence proffered that the prison officials knew or should have known that secondhand smoke poses a serious health hazard. Indeed, whether passive smoking is a serious health threat is to this day a hotly debated subject. Although the Surgeon General's Report of 1986 does suggest that exposure to secondhand smoke creates such a danger, there was no evidence presented that the Nevada prison officials were even aware of that report, or had reason to believe that Report's conclusions as opposed to the findings of other studies disputing the harm caused by passive smoke.

Without evidence of knowledge by Nevada officials of the hazards of secondhand smoke, it simply cannot be said that those officials were deliberately indifferent to McKinney's health. Nevada officials, by not taking steps to reduce or eliminate McKinney's exposure to passive smoke, were at best deliberately indifferent to his desire to be free of passive smoke *exposure*, which, absent any knowledge on their part that such exposure is dangerous to his health, does not constitute deliberate indifference to his *health*.

Therefore, given plaintiff's complete evidentiary failure to satisfy *Seiter*'s express requirement of a showing of "deliberate indifference," even under the most lenient interpretation of that standard, this Court should grant certiorari, and reverse the judgment below, to the extent it allowed plaintiff to proceed on his Eighth Amendment claim.

IV. The Mere Possibility that Forced Exposure to Levels of Secondhand Smoke Will Lead to Cancer or other Disease at some Unspecified Time in the Future Does Not Satisfy the Objective Component of a Cruel and Unusual Punishment Claim.

Even assuming that the Nevada prison officials harbored "deliberate indifference" to McKinney's health, McKinney's claim does not satisfy the "objective component" of an Eighth Amendment violation. *See Hudson v. McMillian*, 112 S. Ct. 995 (1992). Because the judgment below, on this front, independently expands the Eighth Amendment beyond the scope of this Court's precedents, review should be granted.

Needless to say, there are many environmental factors which produce latent risks of injury, yet this Court has never held that the Eighth Amendment requires these factors to be eliminated or reduced in the absence of any present injury to the particular inmate. None of the evidence which Respondent even sought to have admitted below, even viewed in his favor, proved, to a medical certainty, that he would be injured in any particular way from exposure to ETS. As such, the record below, however construed, makes this case no different than the case where a prisoner might complain that the prison diet was too rich in cholesterol, that the prison exercise program leads to too much exposure to ultra-violet radiation, or that prison life subjects him to severe depressive effects (flowing from the loss of companionship, contact with family, and other factors), and thus threatens to inflict latent risks of disease or death.

Whatever else the Eighth Amendment might proscribe, it does not reach these mere risk-enhancing environmental factors. Prisoners who are involuntarily exposed to passive smoke, in this regard, suffer "no adverse physical symptoms . . . different from those suffered by everyone in society." *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc). As the Seventh Circuit agreed, "debate persists about how severe the effects of secondary smoke may be." *Steading v. Thompson*, 941 F.2d 498 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992). This fact, standing alone, negates any Eighth Amendment claim, for the Cruel and Unusual Punishments Clause responds to conditions that are indisputably "cruel and unusual under contemporary standards." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Nevada, of course, may well be obligated to treat prisoners who develop illnesses which result from secondary smoke inhalation, just as it must treat heart disease, stroke, arthritis, cancer, or a number of other illnesses that may be triggered by prison life. But Nevada is not obligated to eliminate risks – such as exposure to secondary smoke – which, while undoubtedly unpleasant, and, even, perhaps "harsh," *id.*, do not violate contemporary standards defining punishment that is cruel. For this reason, as well, review should be granted.

V. The Ninth Circuit's Holding that Nevada's Anti-Smoking Statute Creates a Liberty Interest Protected by the Due Process Clause is Dependent Upon the Doubtful Proposition that Substantive Due Process Rights Can be Derived from State Law.

The Ninth Circuit, in addition to its Eighth Amendment ruling, held that the Nevada anti-smoking statute,

limiting smoking in certain specific public places, applied to prison libraries and therefore created a liberty interest in smoke-free prison libraries that is protected by the Due Process Clause. However, this Court has refused to recognize *substantive* due process protection for interests created by state law. In *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985), this Court assumed, *without deciding*, that a particular substantive due process right, allegedly arising out of state law, existed, and instead rejected the claim on its merits. Most significantly, however, Justice Powell, in his concurring opinion, concluded that:

> While property interests are protected by *procedural* due process even though the interest is derived from state law rather than the Constitution, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), *substantive* due process rights are created only by the Constitution.

Ewing, 474 U.S. at 229 (Powell, J., concurring). This position was not refuted by the majority opinion.

Therefore, because the Ninth Circuit's Due Process holding depends upon the dubious proposition, in light of *Ewing*, that State law can create liberty interests protected by substantive due process, this Court should grant certiorari to reject such an unwarranted expansion of substantive due process that threatens to turn the Constitution into a "font of tort law." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

CONCLUSION

For the foregoing reasons, the amici States respectfully request that this Court grant the writ of certiorari filed by the Attorney General of Nevada, and reverse the judgment below to the extent it allowed plaintiff to proceed on his Eighth Amendment and Due Process claims.

Dated: Honolulu, Hawaii, June 17, 1992.

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